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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioner

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

BRIEF OF THE INTER-VARSITY CHRISTIAN FELLOWSHIP OF THE U.S.A. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a policy denying equal access to secondary students which in fact also discriminates against post-secondary students should be allowed to stand.

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INTEREST OF THE AMICUS CURIAE

Inter-Varsity Christian Fellowship of the U.S.A., is a non-profit organization, incorporated under the laws of the State of Illinois in 1941. It began its existence on a university campus in a situation parallel to the fact pattern before the Court: students voluntarily meeting for Bible study, prayer and discussions concerning Christian faith. Today Inter-Varsity Christian Fellowship encompasses some 900 autonomous, indigenous campus groups ("chapters") in the nation's tertiary educational institutions: universities, colleges, technical institutes and schools of nursing. In its 44 years in the United States, the national organization has neither directed nor controlled the campus groups, but rather makes available resources, training and inter-collegiate activities to

those who desire it. Inter-Varsity Christian Fellowship encourages students to pursue truth and knowledge, to develop intellectually, spiritually, socially and personally, and to pursue vocations that will benefit society.

While many of the Inter-Varsity campus groups are found in "traditional" universities and colleges, some have developed or attempted to develop in public community colleges and vocational institutes which share a common governing board with local secondary schools. Inconsistent interpretations of this Court's decisions prohibiting state-mandated prayer in the public secondary schools not infrequently have an adverse impact on student-initiated, student-led, voluntary prayer or religious expression in post-secondary education at community colleges and technical institutes. In each of these instances, the post-secondary school is encompassed in the same school district and shares a common governing board with the local high school.

Similar to high school students, these students are commuters. In both types of school, students who wish to join with interested peers for a common purpose, will need to do so at a time and place convenient for most. The logical—often the only—solution is during the "academic" day and in school facilities.

Yet not infrequently local school districts deny these students permission to meet. After exhausting administrative routes, students have had to seek legal counsel to gain the rights they should have been freely given under this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

The difficulty is widespread. Reports of discrimination in post-secondary schools have come to the attention of Inter-Varsity Christian Fellowship from, *inter alia*, California, Iowa, Minnesota, Nevada, Oklahoma, and New York.

Inter-Varsity Christian Fellowship is concerned that the rights guaranteed by the Constitution are being denied to college students, as well as high school students, since they share a common school district and governing board with secondary school students. The confusion in the lower court decisions have led many governing boards having jurisdiction in common over both secondary and post-secondary schools in a given district to deny students rights at all levels.

The letter from the parties consenting to the filing of this brief are submitted herewith to the Clerk, pursuant to Rule 36.2.

STATEMENT

Amicus Curiae adopt and incorporate by reference the Statement of the Case appearing in the Brief filed by Petitioner Michael Bender *et al.*

SUMMARY OF ARGUMENT

Amicus submits this brief for the purpose of demonstrating that where secondary and post-secondary educational institutions are governed by a common board, the administrative authorities tend to look to the rule of law considered applicable to the secondary level. Such a policy has the effect of unfairly discriminating against the post-secondary students who desire to assemble for religious purposes and whose right to do so is guaranteed by the Constitution as interpreted by this Court in *Widmar v. Vincent, supra.* The harsh result of the lower court's decision, which denies a valuable right of speech, based solely on its religious content, to secondary and post-secondary students is reached only by ignoring standards set out by this Court in previous First Amendment cases.

ARGUMENT

I. A Policy or Regulation that Results in Unlawful Content-Based Discrimination is Constitutionally Infirm.

A. *The Effect of the Lower Court's Decision Will Perpetuate Content-Based Speech Discrimination Against Students in Some Locally Governed Post-Secondary Schools.*

In Constitutional law, unfair treatment or denial of normal privileges to persons because of their race, age, nationality or religion is a form of discrimination. *Black's Law Dictionary* 420 (5th Ed. 1979). Discrimination need not be intentional; a discriminatory result of a facially neutral practice is sufficient to establish a showing of discrimination. *Rich v. Martin Marietta Corp.*, 467 F. Supp. 587, 608 (Colo. 1979).

The effect of the lower court's decision is to prohibit *secondary* students from assembling voluntarily for the purpose of prayer and Bible study. Arguments are advanced that secondary students are less mature and more impressionable than post-secondary students, and therefore "less able to appreciate the fact that permission for Petros to meet would be granted out of neutrality toward religion and not advancement." *Bender v. Williamsport Area School District*, 741 F. 2d at 552. The lower court followed the reasoning of *Brandon v. Board of Education of Guilderland Cent. Sch.*, 635 F. 2d 971, 978 (2nd Cir. 1980): if the state gives even the "mere appearance" of secular involvement in religious activities, an impressionable student might consider this the state's endorsement or imprimatur.

Where secondary and post-secondary educational institutions share a common governing board, it has been observed that, not infrequently, no age distinction is made in applying policies restricting freedom of religious expression. Five examples illustrate the nature and ex-

tent of the discriminatory impact which results when local school districts apply the same policies to secondary and tertiary students.

Approximately 6,000 full-time students between the ages of 18 and 70 attend the Diablo Valley Community College in California; another 10,000 to 12,000 attend one or more classes. About thirty students participate in the Inter-Varsity Christian Fellowship chapter, one of ten student clubs on campus. The Inter-Varsity group may meet on campus, but not openly for prayer; according to student leader Bill Stephens, last fall the Dean informed the group's leaders that if they were found praying, they would be "kicked off campus". Furthermore, using the argument that the school is publicly funded, school authorities informed the group that it is impermissible to advertise a "prayer meeting;" a "personal concern meeting" is permissible, and a "meditation retreat" has been advertised. Article IX, Sec. 8 of the California Constitution is cited as authority for these restrictions.[1]

Approximately 2,000 students attend Hawkeye Institute of Technology in Iowa. Although potentially 40 clubs are permitted to use campus facilities for their meetings, the Inter-Varsity Christian Fellowship was denied equal access in 1982. As there were no less restrictive alternatives available to them, denial of equal access resulted in the group's demise.

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[1] Appropriation for sectarian schools: Instruction in denominational doctrines

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State. CAL CODE, Art. IX, Section 8, (Deering).

The Area Vocational Technical Institutes (A.V.T.I.) in Minnesota offer post secondary education and training to students ranging in age from 18 to 50. The position of the various school boards illustrates the divergent and inconsistent policies regarding access to campus facilities. Some, but not all, freely grant equal access. At Alexandria A.V.T.I. (approximately 1,000 students) the policy changed from no access to equal access under a new administration. About 100 miles away at Hutchinson A.V.T.I. permission could not be obtained to post announcements of a student-initiated, student-led Bible study.

At Truckee Meadows Community College in Nevada, with an enrollment of 10,000 students, an Inter-Varsity chapter was refused official recognition as a student group. The students are permitted to assemble, but they are not permitted to reserve rooms or publicize on the same basis as other student groups. A similar situation exists at Tulsa Junior College, Oklahoma.

Documentation is on file for other students similarly situated on other campuses. These illustrate the resultant discrimination at the post-secondary level, since local school districts, which do not apply the *Widmar* principle at the secondary level, often do not distinguish between secondary and post-secondary schools under their control.

B. *Such Content-Based Speech Discrimination is Impermissible at the Post-Secondary Level.*

The court below found the school district had created a limited public forum. *Bender v. Williamsport Area School District*, at 548. Therefore, to justify discriminatory exclusion from the forum based on religious content of speech, the school's officials have an obligation to apply Constitutional norms. They must show that the school district's regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Widmar, supra* at 271.

In *Widmar, supra* at 275, this Court held that once a public university created a forum generally accessible to student groups it could not then exclude religious speech or seek to enforce a content-based discrimination against such speech. This Court so held on the rationale that a religious organization's enjoyment of mere "incidental" benefits did not violate the Constitutional prohibition against the "primary advancement" of religion. *Id.* at 273. Any religious benefits derived from an open forum were "incidental" in that (1) an open forum at a public university "did not confer any imprimatur of state approval on religious sects or practices"; and (2) the forum was available "to a broad class of nonreligious as well as religious speakers." *Id.* at 274.

Although this Court did acknowledge that "university students are, of course, young adults" and as such, "are less impressionable than younger students," (*Id.* at 274, n.14), it is significant to note that nowhere in its decision did this Court expressly limit its holding to students attending traditional baccalaureate public universities or even to post-secondary schools. Moreover, it is readily observed that the forum created by locally governed colleges and vocational institutions is comparable to the state university. The freedoms enunciated by this Court in *Widmar* clearly should apply equally to all post-secondary students. They are not applied equally because some post-secondary students attend post-secondary schools governed by the local high school board of education.

II. Failure to Apply Court-Articulated Objective Standards Will Deprive Both Secondary and Post-Secondary Students of a Protected Right.

Students in secondary schools do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Quoting *Burnside v. Byars*, 363 F.2d 749 (1966), the Court

reaffirmed the principle that where there is no finding or showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition of speech or expression cannot be sustained. The burden of proof, therefore, is on the school board to show that the forbidden conduct materially and substantially interfered with the requirements of appropriate discipline in the operation of that school.

In the case at bar, there is no showing that Petros' activities interfered in the slightest with the operation of the school. On the contrary, Petros carefully complied with the school's regulations, even imposing further self-restraint because of its religious purpose. Petros was willing to substitute a non-employee adult for the teacher who monitored attendance and discipline from a distance. Furthermore, Petros voluntarily relinquished the rights granted other groups to publicize activities lest it compromise the position of the school and cause it to encounter the risk of excessive entanglement.

Rather than applying the objective standards of "material and substantial interference" in the discipline and operation of the school, the court below relied on vague premonitions and unsubstantiated fears to reach its conclusion that Petros should be excluded from the forum it had created. Although it cannot be questioned that the school officials have comprehensive authority, such authority must be exercised "consistent with fundamental constitutional safeguards" *Tinker v. Des Moines Independent School District, supra.* Failure to do so deprived these students of a valuable right that this Court has consistently sought to protect. If the lower court's decision is allowed to stand, post-secondary students as well risk imposition of limits on freedom of speech and expression—a result clearly contrary to the holding of this Court in *Widmar.*

CONCLUSION

The lower court's decision, which effects an unconstitutional content-based discrimination on secondary and post-secondary students alike, for the reasons cited herein, should not be allowed to stand.

Respectfully submitted,

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